BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In re Applications of	)	MM Docket No. 92-62
CRYSTAL CLEAR COMMUNICATIONS, INC.	)	File No. BPH-901214MA
THE RADIO MINISTRIES BOARD OF VICTORY CHRISTIAN CENTER ASSEMBLY OF GOD, INC.	)	File No. BPH-901217MJ
For a Construction Permit for a New FM Station on Channel 240A Seelyville, Indiana	)	

To: The Commission

CONSENT MOTION FOR EXTENSION OF TIME

The Radio Ministries Board of Victory Christian Center Assembly of God, Inc. ("Radio Board"), by counsel, hereby seeks a ten-day extension of time in which to submit its opposition to the Application for Review filed November 6, 1992 by Crystal Clear Communications, Inc. ("Crystal Clear"). In support thereof, the following is stated:

According to the certificate of service attached to Crystal Clear's Application for Review (a copy of which is attached hereto as Attachment A), that pleading was placed in the mail to counsel for Radio Board on November 6, 1992. However, Radio Board's counsel did not receive the pleading until today, November 17, 1992, eleven days after the pleading was filed, and only four

business days before the November 23, 1992 deadline for filing an opposition.[1/]

The long delay in delivery was caused by the fact the pleading was not correctly addressed to Radio Board's counsel. Indeed, attached to Radio Board's copy of Crystal Clear's Application for Review was a hand-written, unsigned note stating "This document was sent to the wrong address. Sorry for any inconvenience.". See Attachment B hereto.[2/] Specifically, the certificate of service reveals that Crystal Clear not only sent its Application for Review to undersigned counsel's prior address on M Street, N.W., it also sent it to the wrong street number for that "old" address -- "3033" M Street, rather than "2033" M Street. Apparently the pleading was subsequently returned to the offices of Crystal Clear's counsel because the envelope in which the pleading was received today has a postmark of what appears to be November 10, 1992 and is addressed to "2033" M Street. See Attachment C hereto.[3/] Thus, the pleading apparently was put back into the mail by Crystal Clear's counsel[4/],

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[1/] Section 1.115(d) of the Commission's rules requires that oppositions to applications for review be filed within 15 days. Since November 21, 1992 (the fifteenth day) is a Saturday, Radio Board's opposition pleading would be due on Monday, November 23, 1992.

[2/] The note apparently came from opposing counsel's office.

[3/] Unfortunately, although apparently opposing counsel's office was aware that Radio Board had not received its copy of the pleading as of November 10, 1992, no one from that office advised Radio Board of the filing or the delay in proper mailing.

[4/] Or someone employed by Crystal Clear's counsel.

again addressed to Radio Board's counsel's "old" offices on M Street, this time with the correct street number. Since counsel for Radio Board has not maintained offices at 2033 M Street for more than six months, it took another week for the misdirected pleading to reach Radio Board's counsel at its current offices on 22nd Street.

Thus, the circumstances leading to the gross delay in delivery of the Application for Review were not of Radio Board's making. In fact, Radio Board's Notice of Appearance filed May 4, 1992 reflected that the address of Radio Board's counsel is 1001 22nd Street, N.W., as have other pleadings filed by Radio Board in this proceeding. Furthermore, it would unfairly burden Radio Board to require it to prepare its opposition within only four business days, particularly since its counsel must devote substantial periods of time to preparing reply findings of fact and conclusions of law, due November 25, 1992, in the eight-party Haltom City, Texas FM proceeding before Administrative Law Judge Joseph Chachkin.

In light of the above, and in order to ensure that Radio Board has sufficient time to fully address the issues raised in the Application for Review, Radio Board hereby requests a ten-day

extension of time, to December 3, 1992, in which to file its opposition pleading.[5/]

Counsel for Crystal Clear and for the Mass Media Bureau have been advised as to the filing of this extension request and both have represented that they would have no objection to the extension of time sought herein.

WHEREFORE, in light of the foregoing, it is requested that the deadline for filing an opposition to the Application for Review filed November 6, 1992 by Crystal Clear Communications, Inc. be EXTENDED to and including December 3, 1992.

Respectfully submitted,

THE RADIO MINISTRIES BOARD
OF VICTORY CHRISTIAN CENTER
ASSEMBLY OF GOD, INC.

By: Cheryl A. Kenny
HARRY C. MARTIN
CHERYL A. KENNY

Its Counsel

Reddy, Begley & Martin
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037

November 17, 1992

[5/] Thanksgiving (November 26) falls within that ten-day period.

ATTACHMENT A

BEFORE THE

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WASHINGTON, D. C. 20554

In re Applications of	)	MM Docket No. 92-62
CRYSTAL CLEAR COMMUNICATIONS, INC.	)	File No. BPH-901214MA
THE RADIO MINISTRIES BOARD OF VICTORY CHRISTIAN CENTER ASSEMBLY OF GOD, INC.	)	File No. BPH-901217MJ
For Construction Permit for a New FM Station on Channel 240A In Seelyville, Indiana	)	

To: The Commission

APPLICATION FOR REVIEW

Crystal Clear Communications, Inc. ("Crystal Clear"), by its counsel and pursuant to Section 1.115 of the Commission's rules, hereby seeks review by the full Commission of the decision of the Review Board ("Decision"), FCC 92R-79, released October 7, 1992, in the above-captioned proceeding. As set forth below, decisionally significant aspects of the Decision are: (a) not supported by substantial evidence in the record as a whole; (b) substantively incorrect and in conflict with established precedent and/or (c) sufficiently novel and important to warrant Commission review.

QUESTIONS PRESENTED

Whether the Administrative Law Judge ("ALJ") and Review Board erred in rejecting Crystal Clear's good cause showing and thus failing to accept its Notice of Appearance ("NOA")?

Whether the ALJ and Review Board erred in applying the strict standards applicable to cut-off rules in the instant circumstance?

Whether the Review Board erred in failing to apply Commission precedent regarding attorney nonfeasance?

STATEMENT OF THE CASE

This proceeding involves the mutually-exclusive applications of Crystal Clear and Radio Ministries Board of Victory Christian Center Assembly of God, Inc. ("Radio Ministries") for a new FM station in Seelyville, Indiana. By Memorandum Opinion and Order, FCC 92M-657, released June 11, 1992, the application of Crystal Clear was dismissed for failure to timely file its notice of appeal. The circumstances of this case do not rise to the level which, as defined by applicable Commission precedent, support dismissal. Accordingly, Crystal Clear appealed the Order of the ALJ to the Review Board. In its Decision, the Review Board upheld the Order of the ALJ, holding Crystal Clear to strict adherence with the deadline for filing its Notice of Appearance and rejecting Crystal Clear's argument that good cause supported its late filing.[1]/ The Review Board unjustly gave short shrift to the precedent cited by Crystal Clear which accepts untimely filings in instances of nonfeasance of counsel.

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[1]/ The Review Board incorrectly treated Crystal Clear as factually identical to LRB Broadcasting, FCC 92R-78, released October 7, 1992. Crystal Clear differs from LRB in that it involves a single isolated instance of a late filing. In contrast, several different issues were considered in LRB.

ARGUMENT

I. The Facts of This Case Do Not Warrant Dismissal.

The Order dismissing the Crystal Clear application cites only one reason supporting the presiding Administrative Law Judge's ("ALJ") decision to dismiss: that Crystal Clear had failed to timely file its Notice of Appearance ("NOA"). Crystal Clear's NOA, due to be filed on May 4, 1992, was apparently dated and dispatched to the courier for delivery at the FCC before 5:30 on that date. As evidenced by the Report filed by Crystal Clear's previous counsel, a copy of which is appended to Crystal Clear's Appeal as Attachment 1, the package containing the NOA was not only not delivered by 5:30, but was also inexplicably held by the courier at Washington's National Airport for two weeks. Counsel did not become aware that the NOA had not been filed until May 18th, at which point it was promptly filed.

II. Commission Precedent Supports the Reinstatement of Crystal Clear.

The presiding ALJ and the Review Board fail to apply appropriate Commission precedent which would support the acceptance of Crystal Clear's late filed NOA. In support of his ruling, the ALJ erroneously cites FCC Overrules Caldwell Television Associates, Ltd. ("FCC Overrules Caldwell"), 58 RR 2d 1706 (Comm'n 1984). FCC Overrules Caldwell is, however, inapposite. Caldwell defined the legal standard to be applied in instances when an initial

application was filed after the cut-off date. See Caldwell Television Associates, Ltd., 53 RR 2d 1686 (Comm'n 1983). In FCC Overrules Caldwell, the Commission announced that it would adhere more strictly to the cut-off rules. However, the case at hand involves not an initial cut-off date, but an NOA. The strict standard applicable to cut-off dates is wholly inapplicable here.

In his Order dismissing Crystal Clear, the ALJ ignored the case which sets forth the legal standard to be applied here. In Communi-Centre Broadcasting, Inc. v. FCC, 856 F.2d 1551, 1554 (D.C. Cir. 1988), the Court opined that, in evaluating just cause to dismiss an applicant for failure to prosecute, the Commission must consider (1) the justification for failure to comply, (2) the prejudice suffered by other parties, (3) the burden placed on the administrative system, and (4) the need to punish abuse of the system and deter further misconduct. Although the Review Board identified the appropriate legal standard as set forth in Communi-Centre Broadcasting, Inc., it also failed to apply precedent which would have supported good cause for the acceptance of the NOA.

First, the justification for the late filing of the NOA is unchallenged. Crystal Clear had originally filed an NOA on July 15, 1991 (See Attachment 2), thus, it can reasonably be argued that Crystal Clear filed not too late but too early. At most, the failure to file again with another member of the agency was a relatively minor technicality. Second, as we have seen, not only was an NOA filed earlier than May 4th, but even the slight delay

in the filing of the second NOA had no prejudicial effect. In fact, counsel for the only other applicant in the proceeding received the service copy of Crystal Clear's second NOA on May 7, 1992, only three days after the deadline established by the Hearing Designation Order ("HDO"). See Attachment 3, Motion to Dismiss Application of Crystal Clear Communications, Inc. ("Motion to Dismiss") at Attachment B. The other applicant clearly was on notice that Crystal Clear intended to go forward in the proceeding.[2] Third, the chief "burden" placed on the administrative system has been the burden of reviewing a motion to dismiss Crystal Clear's application and writing the dismissal order. Crystal Clear can hardly be charged with having imposed on other applicant the burden of seeking the dismissal of its application, or with putting the ALJ to the trouble of dismissing it. Finally, the consequences of late-filing are so potentially severe that no one in his right mind would deliberately file late as a tactic to garner an unfair advantage. There is no evidence of "gamesmanship" on the part of Crystal Clear in this instance.

Traditionally, the Review Board has carefully evaluated the individual circumstances surrounding requests for reinstatement by

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[2] The ALJ was similarly aware of Crystal Clear's intention to proceed, as the service copy of Crystal Clear's NOA containing opposing counsel's law firm date stamp of May 7, 1992 was provided as Attachment B to opposing counsel's Motion to Dismiss. Given this clear evidence of Crystal Clear's intention to participate, the ALJ should have accepted the late-filed NOA. See John Spencer Robinson, 5 FCC Rcd 5542 (Rev. Bd. 1990) citing St. Croix Wireless Co., 3 FCC Rcd 4073 (Comm'n 1988) [dismissal for failure to timely file NOA unduly harsh, since applicant's participation in settlement indicated its intent to fully participate].

applicants dismissed for failure to prosecute. In this regard, the Board has tempered the harshness of absolute compliance with procedural rules by considering "unusual" or "very special circumstances" which may explain or excuse failures of an applicant for procedural rules "are not to be wielded with Draconian, mechanical, or insensitive finality." Horizon Community Broadcasters, Ltd., 102 FCC 2d 1267 (Rev. Bd. 1982), citing Pan American Broadcasting Co., 89 FCC 2d 167, 170 (Rev. Bd. 1982). Even recent case law demonstrates that outright dismissal for the untimely filing of an NOA is unduly harsh. In Cannon Communications Corp., an applicant's failure to timely amend its application and failure to comply with an ALJ's order did "not amount to the kind of egregious, disruptive or prejudicial conduct for which the sanction of dismissal is appropriate." 6 FCC Rcd. 570, 570 (Comm'n 1991). Most recently, the conduct of Nancy Naleszkiewicz which led to the late filing of her NOA was deemed not so "derelict in complying with procedural requirements as to deserve dismissal for non-prosecution." Nancy Naleszkiewicz, 7 FCC Rcd. 1797, 1799 (Comm'n 1992). In Nancy Naleszkiewicz, the full Commission applied these standards to exonerate the grossly late (45 days) filing of a notice of appearance. The Commission noted that stricter standards might apply in a comparative context, but it nevertheless pardoned the late filing under circumstances far more egregious than those presented here. The Review Board rejected the precedent established by Nancy Naleszkiewicz in particular, stating that the case was distinguishable because it

involved only one applicant (presumably, the existence of only one applicant eliminates the possibility of prejudicing other applicants). Adherence to the precedent established in Nancy Naleszkiewicz for the acceptance of a late filed NOA would further another Commission policy. Commission policy also favors the selection of the best applicant from among several qualified applicants. For such a minor infraction, the public should not be denied the opportunity for meaningful comparison between the only two remaining applicants, Crystal Clear and Radio Board. Nevertheless, the Review Board erroneously rejected the Commission precedent which excuses late filed NOAs in some instances, and instead applies the strict standard applicable to cut-off rules.

Moreover, in cavalier fashion, the Review Board ignored Commission precedent which excuses an untimely filing attributable to attorney malfeasance. Numerous cases exist which involve the dilatory conduct of applicant's attorneys. Cases in which a pattern of dilatory conduct existed, and in which the applicant failed to exercise due diligence in the wake of such conduct have routinely led to dismissal. See, e.g., V.O.B. Inc., 4 FCC Rcd. 6753 (Rev. Bd. 1989); Warren Price Communications, Inc., 4 FCC Rcd. 1992 (Comm'n 1992); Carroll, Carroll & Rowland, 4 FCC Rcd. 7149 (Rev. Bd. 1989); Mark A. Perry, 4 FCC Rcd. 6500 (Rev. Rd. 1989). In sharp contrast, the nonfeasance of an attorney which was not part of a pattern of dilatory conduct, but an isolated instance, and the attendant diligence of the applicant to rectify

the situation, justifies the reinstatement of an applicant. See Maricopa County Community College District ("Maricopa"), 4 FCC Rcd. 7754 (Rev. Bd 1989). Precedent clearly establishes that reasonable reliance upon one's attorney, and diligent action in the wake of attorney nonfeasance may excuse an applicant's violation of procedural rules.

Prior to the single delayed filing in May of 1992, Crystal Clear's application had been diligently and timely prosecuted in all respects. No prior pattern of attorney inattention had placed Crystal Clear on notice that its application could be in jeopardy. Thus, Crystal Clear reasonably relied upon its attorney. Moreover, immediately upon receipt of the Order dismissing its application, Crystal Clear moved to secure new counsel and act to have its application reinstated. Given that Crystal Clear could not have foreseen a series of bizarre coincidences, or the sudden incapability of its attorney to effectively prosecute its application (whichever the case may be) the outright dismissal of the Crystal Clear application is inordinately harsh.

III. Conclusion.

When the foregoing factors are given proper consideration, it is clear that both the presiding ALJ and the Review Board committed error in this proceeding. The ALJ failed to apply the appropriate standard in rejecting Crystal Clear's late filed NOA. The Review Board identified the proper standard, yet callously failed to apply Commission precedent supporting the acceptance the NOA for good

cause. The dismissal of Crystal Clear's application by the ALJ and the Review Board is inordinately harsh. The slightly late-filed NOA had (a) already been filed with the agency, (b) occurred under totally unpredictable circumstances, and (c) meets none of the criteria established by for outright dismissal of an application. Crystal Clear respectfully requests that its application be reinstated.

Respectfully submitted,

CRYSTAL CLEAR COMMUNICATIONS, INC.

By: _____
Donald J. Evans

_____
Marianne H. LePera

Its Attorneys

McFadden, Evans & Sill
1627 Eye Street, N.W., #810
Washington, D.C. 20006
(202) 293-0700

November 6, 1992

CERTIFICATE OF SERVICE

I, Sherry Schunemann, a secretary in the law firm of McFadden, Evans & Sill, do hereby certify that a copy of the foregoing "Application for Review" was mailed by First Class U.S. Mail, postage prepaid, this 6th day of November, 1992 to the following:

Robert Zauner, Esq.
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 7212
Washington, D.C. 20554

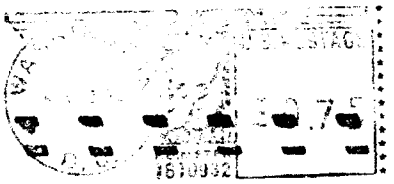
Harry C. Martin
Cheryl A. Kenny
Redly, Begley & Martin
3033 M Street, N.W.
Washington, D.C. 20036

Sherry Schunemann

ATTACHMENT B

This document was sent to the wrong address. Sorry for any inconvenience.

ATTACHMENT C



[redacted]

[redacted]

[redacted]

MCFADDEN, EVANS & SILL

[redacted]

TO:

Harry C. Martin, Esquire
Cheryl A. Kenny, Esquire
Reddy, Begley & Martin
2033 M Street, N.W., #500
Washington, D.C. 20036

CERTIFICATE OF SERVICE

I, Marilyn L. Phillips, a secretary in the law firm of Reddy, Begley & Martin, hereby certify that on this 17th day of November, 1992, copies of the foregoing **CONSENT MOTION FOR EXTENSION OF TIME** were hand delivered or mailed, first class, postage prepaid, to the following:

John I. Riffer, Esquire *
Associate General Counsel - Adjudication Division
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 610
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Hearing Branch, Mass Media Bureau
Federal Communications Commission
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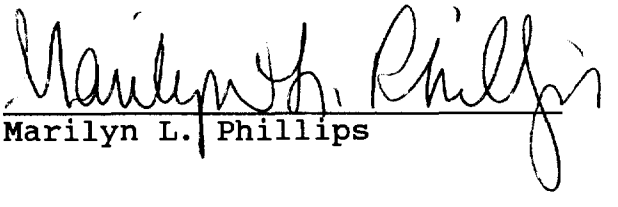

Marilyn L. Phillips

*** HAND DELIVERED**

**** Also sent by facsimile transmission**